United States District Court
District of Massachusetts

COLONIAL WHOLESALE
BEVERAGE CORPORATION,
Plaintiff,

V. CIVIL ACTION NO. 2003-12068-RCL

LABATT USA, L.L.C.,
Defendants.

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION TO REMAND (#5)

COLLINGS, U.S.M.J.

I. Introduction

The plaintiff, Colonial Wholesale Beverage Corporation (hereinafter "Colonial"), instituted this action on September 30, 2003 in the Massachusetts Superior Court for Bristol County naming Labatt USA, L.L.C. (hereinafter "Labatt") as the defendant. On October 24, 2003, Labatt filed a Notice of Removal to the United States District

Court for the District of Massachusetts together with the answer to the complaint.

There is no question but that this court may properly assert original jurisdiction in this case under 28 U.S.C. §1332[1] and that removal was proper under 28 U.S.C. §1441. Nevertheless on November 21, 2003, Colonial filed a Motion to Remand (#5) this action to the state court and a memorandum in support of its motion. (#6) The plaintiff essentially contends that abstention by the federal court is proper in light of the facts and circumstances of this case and, consequently, that the matter should be remanded. Labatt disagrees and so has filed an opposition (#11) to Colonial's motion. With the filing of the plaintiff's reply brief (#14) on December 18, 2003, the record on the motion to remand is complete.

II. The Facts

[1] The plaintiff is a corporation organized under the laws of Massachusetts with its principal place of business at 965 Reed Road, North Dartmouth, Massachusetts. (#4 Complaint ¶2; #2 Answer ¶2) The defendant is a Limited Liability Company organized under the laws of Delaware and has its principal place of business at 101 Merritt 7, Norwalk, Connecticut. (#4 ¶3; #2 ¶3) Given these undisputed facts, the parties satisfy the complete diversity requirement for federal jurisdiction under 28 U.S.C. §1332(a)(1). Further, on the state civil action cover sheet, Colonial calculated its damages to be $800,000.00. (#4) Thus the amount in controversy in this matter exceeds the threshold amount of $75,000.00 required under 28 U.S.C. §1332(a).

According to the allegations of the complaint[2], Colonial is a wholesaler of malted and other alcoholic beverages whose sales territory generally includes Bristol County, Barnstable County, Dukes County, Nantucket County, and portions of Plymouth and Norfolk Counties in Massachusetts. (#4 ¶5) For years Colonial sold Bass Ale in this territory on an exclusive basis pursuant to a distribution agreement with Guinness Bass Import Company (hereinafter "GBIC"). (#4 ¶¶6, 7, 9) In September 2002, GBIC advised Colonial as well as other wholesalers that the Bass Ale brand was to be transferred to Interbrew U.K. Ltd. (hereinafter "Interbrew"). (#4 ¶11) About six months later in March of 2003, GBIC and Interbrew sent a joint letter to the wholesalers including Colonial which provided information concerning new ordering and payment procedures. (#4 ¶12) At some time between March 2003 and June 2003, Labatt entered into an agreement with Interbrew whereby Labatt was designated to be the United States importer of Bass Ale. (#4 ¶13)

In June of 2003, Labatt forwarded an executed copy of a

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[2] For present purposes the facts are gleaned from the allegations of the complaint. The defendant denies many of these facts.

document entitled Labatt USA L.L.C. Bass Distribution Agreement (hereinafter "the agreement") to Colonial. (#4 ¶16) The terms of the agreement differed from the arrangement Colonial had enjoyed with GBIC in that the plaintiff previously had exclusivity in its territory whereas the new agreement provided for the non-exclusive sale of Bass Ale in a territory consisting of Bristol County and the towns of Plainville, Foxboro, and Wrentham in Norfolk County. (#4 ¶¶18-19) Colonial learned that other wholesalers had received similar non-exclusive agreements from Labatt, but that one such wholesaler purportedly had received permission from a Labatt representative to strike the word "non-exclusive" in paragraph 4.0 of the agreement and insert the word "exclusive" in its stead. (#4 ¶19) Colonial decided similarly to amend paragraph 4.0 of its agreement in order, in its view, to maintain the exclusivity in its territory. (#4 ¶21) After making the change, Colonial executed the agreement and forwarded it to Labatt. (#4 ¶21) By July of 2003, the plaintiff was placing orders with, and receiving shipping information from, Labatt. (#4 ¶22)

In early July 2003, Colonial entered into discussions with United Liquors, Ltd. (hereinafter "United"), a wholesaler, with respect to

United's decision to sell its distribution rights to several malt beverage product lines. (#4 ¶24) On July 14, 2003, United and Colonial entered into a Purchase and Sale Agreement for six of United's product lines which included product lines United purchased from Labatt, but did not include Bass Ale. (#4 ¶25) In late July of 2003, Labatt contacted the plaintiff to schedule a meeting to discuss the product lines involved in the Colonial/United sale and also, according to the plaintiff, so that Labatt could review and approve the Colonial/United agreement. (#4 ¶¶27, 29) That meeting was held on July 30th and focused solely on the products at issue in the Colonial/United agreement. (#4 ¶30)

Colonial alleges that on August 13, 2003, it was contacted by Mr. Gerry Sheehan (hereinafter "Sheehan"), the owner of L. Knife & Sons (hereinafter "Knife"), another beverage wholesaler, concerning the potential sale of Colonial's Bass Ale distribution rights to Knife. Sheehan informed the plaintiff that Labatt had instructed him to tell Colonial that if Colonial would not sell its Bass Ale rights to Knife at a below market value price, Labatt would allow Knife to sell Bass Ale in Bristol County and thus devalue Colonial's Bass Ale rights. (#4 ¶32) In addition Sheehan advised Colonial that

> Craft Brewers Guild, a small malt beverage wholesale company owned by Mr. Sheehan, had been granted the rights to all the Labatt products that Colonial had contracted for in its Purchase and Sale Agreement with United.

Complaint #4 ¶34.

On the following day, August 14, 2003, Colonial purportedly was contacted by another beverage wholesaler, A&E Distributors ("A&E"), which serviced areas adjacent to Colonial's territory. (#4 ¶37) A&E informed Colonial that it had been instructed by Labatt to offer to purchase Colonial's rights to sell Bass Ale in the towns of Plainville, Foxboro, and Wrentham. (#4 ¶37)

On September 16, 2003, a representative of Labatt contacted Colonial to discuss the Bass Ale situation. (#4 ¶38) During this conversation, the representative expressed Labatt's objection to the alteration Colonial made to section 4.0 of the agreement. (#4 ¶38)

Approximately two weeks later on September 30, 2003, Colonial filed the seven-count complaint against Labatt in the state court. In Count I, Colonial alleges that Labatt breached the contract between the parties granting Colonial the exclusive right to sell Bass Ale within its designated territory. (#4 ¶¶40-44) Colonial claims in Count II that

Labatt violated Mass. Gen. L. c. 93A §§2 and 11 by knowingly and willfully engaging in unfair and/or deceptive acts or practices by giving Knife the right to sell Bass Ale in Colonial's exclusive territory. (#4 ¶¶45-49) Labatt is alleged to have breached the covenant of good faith and fair dealing in Count III by entering into agreements with other wholesalers in an effort to undermine Colonial and to limit Colonial's ability to negotiate for the right to sell its Bass Ale rights. (#4 ¶¶50-52) In Count IV, Colonial contends that Labatt's actions constitute a restraint of trade in violation of Mass. Gen. L. c. 93A §4. (#4 ¶¶53-55)

Colonial asserts in Count V that, based upon the agreement and Labatt's subsequent actions, Labatt should be estopped from claiming that Colonial does not have exclusive rights to sell Bass Ale within its territory. (#4 ¶¶56-57) Labatt is alleged to have interfered with an advantageous contractual relationship between Colonial and United in Count VI. (#4 ¶¶58-61) Lastly, in Count VII Colonials alleges unfair and deceptive acts in violation of Mass. Gen. L. c. 93A §§2 and 11 with respect to Labatt's rejection of Colonial's agreement with United and subsequent insistence that the rights to distribute Labatt products be

sold to Craft Brewers Guild. (#4 ¶¶62-64)

III. The Abstention Doctrine

The Supreme Court has held that although a federal court "does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, refuse to enforce or protect legal rights." *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943). The abstention doctrine is not a rigid, bright line rule, but rather is dependent on the facts in any given case. Colonial argues that this action should be remanded to the Massachusetts state court based on the so-called *Burford* doctrine. Under *Burford* abstention, a federal court sitting in equity may abstain where unclear state law exists that effects a complex state administrative procedure that could be disrupted by a federal court's ruling on state law. *Burford*, 319 U.S. 332.

In *Burford*, Sun Oil Co. (hereinafter "Sun") sought to enjoin the Texas Railroad Commission (hereinafter "Commission") from granting Burford a permit to install oil wells on his property. *Burford*, 319 U.S. at 316. Sun brought the suit in federal court rather than Texas state court. In reaching the decision that the federal court should have

abstained from hearing the case and thus allowing the case to proceed in Texas state court, the Supreme Court highlighted two factors that a federal court should analyze when determining if abstention is appropriate. *Burford*, 319 U.S. at 318.

First, the Court analyzed whether there were unclear issues of state law that effected a state program of substantial public import. *Burford*, 319 U.S. at 318. Texas, at the time, had a unique interest in regulating the issuance of permits for new oil wells. The Court noted that for geologic and economic reasons, the state must closely regulate the installation of wells for both the good of the well owners and the public in general. "Texas interests in this matter are more than that very large one of conserving gas and oil ... it must also weigh the impact of the industry on the whole economy of the state." *Burford*, 319 U.S. at 320. The Court determined that if there was unclear law concerning such an important public program, the federal courts could abstain, letting state courts settle the unclear issues of state law. *Burford*, 319 U.S. at 320.

Next, the Court analyzed whether a federal court decision would effect the state's policy and if the court's ruling would disrupt the

state's efforts to administer the policy. *Burford*, 319 U.S. at 321-22. Beginning in 1919, the Commission had instituted rules allowing for the installation of oil wells so that each landowner may recover the oil beneath his or her property while protecting the interests of the public in not overburdening or destroying this precious resource. *Burford*, 319 U.S. at 322. The legislature then established a system of judicial review for all Commission decisions in the Texas courts. In fact, all appeals of Commission orders were to follow one track: Any appeal of an order in the entire State of Texas was brought to the district court in Travis County. These decisions were then reviewed by the Court of Civil Appeals, then by the Supreme Court of Texas. *Burford*, 319 U.S. at 324. The Supreme Court noted that "[t]o prevent the confusion of multiple review of the same general issues, the legislature provided for the concentration of all direct review of the Commission's orders in the State district courts of Travis County." *Burford*, 319 U.S. at 326. The reasoning behind this was that having one court hear all the appeals made it less likely that contrary decisions would be reached. *Burford*, 319 U.S. at 326-27. The Supreme Court concluded that federal court decisions concerning Commission orders defeated the purpose of the

policy of Texas. *Burford*, 319 U.S. at 329. The Court then held that "equitable discretion should be exercised to give the Texas courts the first opportunity to consider" appeals of the Commission's orders. *Burford*, 319 U.S. at 332.

Subsequent decisions by the Supreme Court narrowed the applicability of the *Burford* doctrine. In *New Orleans Public Service, Inc. v. Council of the City of New Orleans (NOPSI)*, the Court found that "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 362 (1989). In *NOPSI*, the City of New Orleans rejected a rate increase that NOPSI requested to help offset the costs associated with the construction of a nuclear power plant. Employing the two-part *Burford* test, the *NOPSI* Court determined that even though the issues in the case were the state and local government's power to set rates, the complex process entailed in setting rates, and the public's interest in keeping rates uniform and low, there was no reason for the district court to abstain. The Court held that "no inquiry beyond the

four corners of the...order is needed to determine" whether the order by the City was justified and whether federal law preempted the rate order. *NOPSI*, 491 U.S. at 363. The Court held that even though a decision by the federal district court may effect an important state policy, there was no doctrine which suggested that a federal court must abstain. *NOPSI*, 491 U.S. at 373.

In *Quackenbush*, the most recent *Burford* doctrine case decided by the Supreme Court, the doctrine was again narrowed. *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706, 728 (1996). The case involved an effort by the California Insurance Commissioner to recover reinsurance proceeds under various state common law tort and contract claims. The Court, in deciding that abstention was not warranted in this situation, determined that a balance must be struck between an important state or local interest and the right of parties or certain classes of cases to be resolved in federal court. *Quackenbush*, 517 U.S. at 728. The final decision of the Court rested on the fact that the case was "nothing more than a run-of-the-mill contract dispute," not a question of unclear state law. *Quackenbush*, 517 U.S. at 729.

Another question that must be answered before a federal court

may abstain is whether the abstention doctrine applies to an action for monetary damages. In *Burford* and *NOPSI*, the plaintiffs were seeking equitable relief, and the Supreme Court had little problem with federal courts applying or withholding their historical equitable powers. However, Colonial is seeking both equitable and monetary relief. The Court in *Quackenbush* provided an answer as to whether a district court may abstain from a claim involving damages, not just equitable claims. *Quackenbush*, 517 U.S. at 706.

In sum, the Supreme Court held that a federal court could stay an action for common law damages, but could not dismiss or remand it completely. *Quackenbush*, 517 U.S. at 730-31. In a damages case, a federal court should only withhold action until a concurrent state proceeding has concluded, thus clarifying any issues of unclear or complicated state law.

IV. Discussion

First and foremost it is important to bear in mind that abstention is "the 'exception,' not the rule." *Bath Memorial Hospital v. Maine Health Care Finance Commission*, 853 F.2d 1007, 1013 (1 Cir., 1988). In an effort to fit within the exception, Colonial contends that

Massachusetts has established a uniform administrative process for governing the operation of the alcoholic beverage industry. (#6) It is to be recalled that under the *Burford* test, it must be shown first, that a complex administrative program exists for the regulation of alcoholic beverages in Massachusetts, and second, that a decision by this court will disrupt the uniform or cohesive application of this program. *Burford*, 319 U.S. at 320-22.

Massachusetts has codified numerous policies for the purpose of regulating the relationships between beverage importers, wholesalers, and consumers. Mass. Gen. L. c. 138 §25 *et seq.* (2003). Mass. Gen. L. c. 138 §25 specifically deals with the lending and borrowing of money as well as credit extensions between importers, wholesalers, or licensees in the alcoholic beverage industry. This section prohibits the lending of funds by any licensee of the chapter to any other. The section also provides the parameters within which credit may be extended and that terms of credit must be uniform between all parties with whom that an importer deals. In other words, no preferential treatment is allowed.

Price discrimination by importers in their dealings with

wholesalers or retailers is prohibited by Mass. Gen. L. c. 138 §25A. Specifically, no importer may discriminate in price, in discounts for time of payment, or in discounts on the quantity of merchandise sold, between one wholesaler and another. Sections 25B, 25C, and 25D require that schedules be filed with the Alcoholic Beverages Control Commission ("ABCC") concerning the minimum prices for sale to wholesalers and consumers. Under section 25B, an importer must file a schedule containing the bottle and case price to be charged to a wholesaler. Mass. Gen. L. c. 138 §25B(c). Section 25C also requires filing of product information including alcohol content and the minimum resale prices that a wholesaler or retailer may charge the consumer. Mass. Gen. L. c. 138 §25C(b). Section 25D requires that an affirmation be made by the importer or wholesaler to the effect that the minimum prices provided in sections 25B and 25C are not higher than the lowest price that any importer or wholesaler will sell the product for elsewhere in the United States. Mass. Gen. L. c. 138 §25D(a).

Under Mass. Gen. L. c. 138 §25E, it is unlawful for an importer of alcoholic beverages to refuse to sell, except for good cause, any

brand name item to a wholesaler to whom that importer had made regular sales in the previous six months. An importer must give written notice to the wholesaler specifying the reason for the cessation of sales one hundred and twenty days prior to the discontinuance. Mass. Gen. L. c. 138 §25E. Section 25E further provides that only disparagement of the product, unfair preference for other products so as to impair the sales of the importer's product, failure to exercise best efforts, improper trade practices, or failure to comply with the terms of sale between the parties are good cause reasons to discontinue sales. Mass. Gen. L. c. 138 §25E. A wholesaler may petition the ABCC for a hearing on the discontinuance and the ABCC may enjoin the importer from discontinuing sales until such hearing is conducted. Mass. Gen. L. c. 138 §25E.

After examining the statutes created by the legislature, it is clear that in Massachusetts a strong administrative policy exists for the regulation of the distribution of alcoholic beverages. The statutory provisions ensure that both the sellers and consumers of alcoholic beverages are protected from unfair pricing and discriminatory sales practices by both in and out of state actors. The Commonwealth has

set up a judicial review policy, akin to that in *Burford*, whereby a party can petition the ABCC and thereafter appeal to the state's courts any statutory violation.

At first glance, this administrative program would appear to be exactly what *Burford* is discussing. However the Supreme Court, as well as lower federal courts, have repeatedly held that federal courts need not abstain from hearing cases concerning state alcoholic beverages regulation. *Hosteter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (Abstention was not appropriate where there was "no danger that a federal decision would work a disruption of an entire legislative scheme of regulation."); *Guinness Import Co. v. Mark VII Distributors, Inc.*, 971 F. Supp. 401 (D. Minn., 1997) (Under similar facts as the present case, the district court declined to abstain where the interpretation of a Minnesota statute controlling the sale of alcohol did not require specialized knowledge on the part of the court).

The second question to be asked when applying *Burford* is whether federal review of the issues in the case disrupt this state procedure. In this instance, it will not. First, Colonial has not alleged

any violation of Mass. Gen. L. c. 138, nor did it petition the ABCC for a hearing concerning the actions of Labatt. Rather, Colonial's claims center around violations of Mass. Gen. L. c. 93A (the Massachusetts consumer protection statute), breach of the covenant of good faith and estoppel. None of these claims impact the interest of Massachusetts in controlling the distribution of alcoholic beverages. A ruling by this Court as to whether Labatt violated Chapter 93A or the other contract-type claims will not effect this administrative process regulating the sale and distribution of alcoholic beverages in Massachusetts.

Second, a close examination of cases heard by the ABCC shows that Colonial's causes of action fall outside the scope of chapter 138 in any event. *Miller Brewing Co. v. ABCC*, 56 Mass. App. Ct. 801, 780 N.E.2d 80 (2002) (importer of alcoholic beverages discriminated among its wholesalers by providing some with advantageous credit terms); *Somerset Importers, LTD. v. ABCC*, 28 Mass. App. Ct. 381, 551 N.E.2d 545 (1990) (importer of alcoholic beverages can not refuse to sell alcoholic beverages to a wholesaler with whom who he regularly conducts business). Each of these cases was initially heard by the ABCC and reflect the type of issues delineated in chapter 138, none

of which are present in Colonial's claims.

To summarize, while Massachusetts admittedly has a detailed procedure in place with respect to the regulation of alcoholic beverages, the claims in this case do not implicate that program. Adjudication of Colonial's claims in this Court would not disrupt the efforts of the ABCC to regulate the distribution and sale of alcoholic beverages in the Commonwealth. A federal court should not abstain from hearing a case rightfully brought in diversity under 28 U.S.C. §1332 merely because a complex administrative program may be involved.[3]

VI. Recommendation

For the reasons stated, I RECOMMEND that Plaintiff Colonial Wholesale Beverage Corporation's Motion to Remand (#5) be DENIED.

V. Review by the District Judge

The parties are hereby advised that pursuant to Rule 72, Fed. R. Civ. P., any party who objects to this recommendation must file a specific written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The

[3] Having reached this conclusion, there is no need to address the question of whether a federal court should abstain where both equitable and monetary damages are sought.

written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude further appellate review. *See Keating v. Secretary of Health and Human Services,* 848 F.2d 271 (1 Cir., 1988); *United States v. Emiliano Valencia-Copete,* 792 F.2d 4 (1 Cir., 1986); *Scott v. Schweiker,* 702 F.2d 13, 14 (1 Cir., 1983); *United States v. Vega,* 678 F.2d 376, 378-379 (1 Cir., 1982); *Park Motor Mart, Inc. v. Ford Motor Co.,* 616 F.2d 603 (1 Cir., 1980); *see also Thomas v. Arn,* 474 U.S. 140 (1985).

/s/ Robert B. Collings
ROBERT B. COLLINGS
United States Magistrate Judge

April 27, 2004.

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Reginald C. Lindsay, presiding
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Attorneys

H. Glenn Alberich Burns & Levinson LLP 125 Summer Street Boston, MA 02110 617-345-3660 617-345-3299 (fax) galberich@burnslev.com Assigned: 10/24/2003 LEAD ATTORNEY ATTORNEY TO BE NOTICED	representing	Colonial Wholesale Beverage Corporation (Plaintiff)
Gerald J. Caruso Rubin & Rudman, LLP 50 Rowes Wharf Boston, MA 02110 617-330-7000 617-439-9556 (fax) jcaruso@rubinrudman.com Assigned: 10/24/2003 LEAD ATTORNEY ATTORNEY TO BE NOTICED	representing	Labatt USA L.L.C. (Defendant)
Nur-ul Haq Rubin and Rudman, LLP 50 Rowes Wharf Boston, MA 02110 617-330-7000 617-439-9556 (fax) nurulhaq@rubinrudman.com Assigned: 10/24/2003 LEAD ATTORNEY ATTORNEY TO BE NOTICED	representing	Labatt USA L.L.C. (Defendant)
Thomas J. Mango Rubin & Rudman, LLP 50 Rowes Wharf Boston, MA 02110-3310 617-330-7000 617-439-9556 (fax) tmango@rubinrudman.com Assigned: 10/24/2003 LEAD ATTORNEY ATTORNEY TO BE NOTICED	representing	Labatt USA L.L.C. (Defendant)